1. Introduction

1.1 CONTEXT

A few years ago it was announced that '[L]abour law is widely considered to be in crisis'.¹ That crisis was deemed to have both external and internal dimensions. The external dimension concerned a number of attacks against the dominant provisions of labour law. There was the suggestion that labour law no longer fit with the reality of either economic conditions or the way in which labour relationships were constructed. It no longer covered those individuals in need of protection, in particular those left bereft by changes in economic conditions. Labour law had not moved with the (economic) times. Well-worn arguments that labour law provided an obstacle to efficiency, flexibility, and economic and social progress could be reasserted and they gained momentum. The internal dimension was characterised as an introspective process within labour law and amongst labour lawyers. In the face of changing economic and social conditions questions were raised about whether traditional labour law concepts still met the needs of labour. It was also questioned whether the inherited concepts which were used to explain the position of labour and the constitution of labour relationships continued to display conceptual coherence. The justifications for labour law needed to be rethought and reconsidered.

One of the main responses to this 'crisis' has been to suggest that labour law needs to be constructed around the idea of precarious work. As precarious work has been a major feature of the economic and social changes identified, there needs to be more thinking about how the phenomenon of precarious work has been created and what this means for labour law institutions. Indeed, regulations have been introduced at various geographical levels to attempt to tackle the problem of precarious work. As precarious work has been largely associated with non-standard

¹ G Davidov and B Langille, 'Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time Has Now Come?' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 1

working outside the traditional 'standard employment relationship' (full-time work for a single employer), regulations have focussed on certain vulnerable groups: part-time workers, fixed-term workers and temporary agency workers. For each of these groups legislation has been created to ensure that they are treated 'equally' with the standard workforce. It was hoped that in providing this legislation for precarious work groups, labour law would be meeting a practical need, but it would also regain its legitimacy. It would be seen as responsive to dominant economic (and social) forces, demonstrating its efficiency and flexibility. Indeed, 'flexibility' has been the watchword of many of these kinds of regulations.

It is in the context of this 'crisis' and the associated regulation for precarious work that this book lies. The book investigates in detail the trend towards the regulation for precarious work, what this means and how it should be understood. However, this book goes beyond this pure exposition of the 'phenomena' and regulation of precarious work. It takes the 'crisis' as an opportunity for greater thinking about the whole concept of 'vulnerability' in employment relationships. In the literature on precarious work, vulnerability has been considered in its links with the notion of precarious work. Indeed, the terms 'precarious' and 'vulnerable' have been used more or less interchangeably. This is particularly the case in the literature concerned with the determination of the factors which constitute 'precarious' work, and the social effect of this phenomenon. For example, Eyraud and Vaughan-Whitehead identify a number of risks in the 'new economy' which 'put workers in more uncertain or vulnerable situations'.² When these risks combine, workers enter into 'vulnerability vectors' which mean that workers are trapped in work of poor quality, and are at increased risk of experiencing other social problems. Non-standard work is cited as a point of entry into such a 'vulnerability vector', particularly for women and younger workers.³ The width of the term 'vulnerability' also means that it is used to develop the 'dimensions of precariousness' identified by Rodgers as constituting precarious work. Rodgers' model identified that precarious work should be defined according to four elements:

- (1) temporal (degree of certainty over the continuity of employment);
- (2) organisational (working conditions, pay, individual and collective control over work);

² F Eyraud and D Vaughan-Whitehead, *The Evolving World of Work in the Enlarged EU: Progress and Vulnerability* (ILO 2007) 31

³ *Ibid* 39

- (3) economic (sufficient pay and salary progression); and
- (4) social (legal and social protection).⁴

This model has been developed by Grimshaw and Marchington to suggest seven features of jobs that carry a risk of vulnerability, and ‘four dimensions of vulnerability’ created by the UK employment model (flexibility, insecurity, under-valuation and poor working conditions).⁵

The aim of this book is to consider the concept of ‘vulnerability’ much more closely, and the relationship of the notion of vulnerability to a number of different theoretical perspectives and standpoints (including the notion of precarious work). Indeed, the notion of ‘vulnerability’ is chosen precisely because it is flexible enough to allow this exposition of the relationship between different theoretical perspectives on the need for regulation in the employment relationship, while still within the context of the trends towards the regulation of precarious work. The notion of vulnerability is chosen for an additional reason: the importance of *vulnerability theory* to the arguments in this book. This vulnerability theory has not been traditionally associated with labour law, but it is argued in this book that it provides a really useful framework for a more in-depth examination of the need for regulation in employment relationships. It is especially useful because it puts the labour subject centre stage. It takes the focus away from the economic and social processes which affect the labour market (in general or at a specific moment) and moves the focus towards thinking about the individuals affected by the institutions. But it is not limited to a consideration of the external effect of economic processes on individuals or groups in the labour market. It is concerned with the complex and ever-changing nature of the individual, and the multi-factoral and multi-dimensional processes involving those individuals and groups.

In the section that follows, there will be an exposition of the story of labour law in response to the ‘crisis’, and particularly the development of the notion of precarious work. Section 1.3 will highlight some of the limitations of this narrative, and Section 1.4 will outline the alternatives and counter-arguments which will be explored more fully during the course of this book. In Section 1.5, there will be an explanation of the structure of the book and the reasons for the choice of that structure.

⁴ G Rodgers, ‘Precarious Work: The State of the Debate’ in G Rodgers and J Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (ILO 1989) 3

⁵ D Grimshaw and L Marchington, ‘United Kingdom: Persistent Inequality and Vulnerability Traps’ in F Eyraud and D Vaughan-Whitehead (eds), (n 2) 550

1.2 FROM CLASSICAL LABOUR LAW TO REGULATION FOR PRECARIOUS WORK

Arguably the link between vulnerability and labour law can be discerned in the foundational argument that labour law is ‘not a commodity’.⁶ The attempt here is to recognise that workers are first and foremost people rather than simply commodities to be bought and sold on the labour market. This recognition determines that regulation should aim to imbue the human subject of labour law with ‘dignity’ so that ‘all forms of work ... can be a source of personal well-being and social integration’.⁷ Of course, this reference to the decommodification of the subject of labour law represents only half of labour law’s traditional theory of justice.⁸ The second half is not about labour *per se*, but about the relationship between that labour and the employers of labour. The argument is that employees are in need of protection because they suffer from an ‘inequality of bargaining power’ vis-a-vis their employers. This means that the ‘normal’ set of rules of market ordering needs to be limited to ensure that the worst excesses of labour market exploitation are avoided (either through law or collective bargaining processes).

Recently, these foundational aspects of labour law have been challenged. The notion that the ‘inequality of bargaining power’ between employers and employees should be the foundation for labour law regulation has been criticised. It is argued that this notion is outdated for two reasons. Firstly, it is based on certain assumptions about the position of work in society, namely, that work or employment is simultaneously the site of:

- (1) the greatest social oppression;
- (2) the greatest inequality of bargaining power;
- (3) the most revolting excesses of power; and
- (4) the greatest social conflict.⁹

⁶ This formulation is cited specifically as the ‘fundamental principle’ of the International Labour Organisation in paragraph I (a) of the Declaration of Philadelphia which is annexed to the ILO Constitution. The Constitution is available at <<http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>> accessed 1 August 2012

⁷ G Rodgers, E Lee, L Swepston and J van Daele, *The ILO and the Quest for Social Justice 1919–2009* (International Labour Office 2009) 7

⁸ B Langille, ‘Labour Law’s Theory of Justice’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 105

⁹ A Hyde, ‘What is Labour Law’ in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) 46

This is simply no longer the case.¹⁰ Secondly, it is based on the stereotype of the ‘standard employment relationship’ (full time, year round work for a single employer) under which inequality of bargaining power may be taken for granted.¹¹ The reality is that this ‘standard employment relationship’ no longer exists (if it ever did), so that regulation based on this principle fails to capture those most in need of labour market protection. There are also problems with embedding the foundation of labour law in the *link* between ‘inequality of bargaining power’ and the recognition that ‘labour is not a commodity’. It has been argued that this link constrains the possibilities of labour law, because worker protection is limited to addressing the lack of bargaining power experienced by workers in the negotiation of their terms and conditions of employment. This means that labour law tends towards paternalism and does not properly consider the assets, capabilities and potential of workers as human beings. Essentially, the foundation of labour law in an understanding of the unequal relationship between employee and employers means that the range of human vulnerabilities inherent in the assertion that ‘labour is not a commodity’ is not explored: ‘[d]ignity will not provide the required moral ammunition if it is understood as merely providing a set of reasons as to why humans must be protected when they meet the wheels of commerce.’¹²

The literature on precarious work develops some of these criticisms of the traditional theory of labour law, and provides further context for the arguments made in this book. The starting point for this literature is the deterioration of the ‘standard employment relationship’, and the set of institutions and work practices which served to underpin this relationship. It is argued that for a time, between the end of the Second World War and the mid-1970s, the development of institutions (including labour law) around this ‘standard employment relationship’ made some sense. The ‘Fordist’ model of industrial production (large industrial enterprises

¹⁰ For example, persistently high levels of *unemployment* can be seen to pose the greatest social threat. This is well represented by the comments of Eyraud and Vaughan-Whitehead that: ‘From our analysis of the labour market we can distinguish between different types of risk with regard to employment and working conditions that may threaten workers ... We would consider the greatest risk as *remaining excluded from the labour market* because this often leads more quickly to social exclusion.’ F Eyraud and D Vaughan-Whitehead, ‘Employment and Working Conditions in the Enlarged EU: Innovations and New Risks’ in F Eyraud and D Vaughan-Whitehead (eds), (n 2) 31

¹¹ M Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *ILJ* 1, 28

¹² Langille (n 8) 111

engaged in mass production based on a narrow specialisation of skills and a clear management hierarchy) and the male-dominated nature of the workforce supported the 'standard employment relationship', which, because of its dominance, became the foundation of an 'occupational status' around which labour law and other social institutions (social security law) were established. Under these (industrial and social) conditions, a particular social compromise was reached whereby the (male) worker 'conceded dependency' in return for a secure livelihood for himself and his family.¹³ The upshot was a 'core of social stability' which both protected workers and also provided a basis for economic growth and stability.¹⁴

However, there are a number of economic and (related) social processes which have undermined this standard employment relationship and its institutions. The economic processes are cited in the literature as:

- (1) technological innovation (in the fields of information technology);
- (2) increased competition stemming from globalisation; and
- (3) the considerable increase in the dominance of the service sector over that of manufacturing.¹⁵

Social changes have included ageing societies and changing consumer demand, as well as the 'crumbling' of the gender contract¹⁶ (the male head of the household working to provide for his family). The buzz-word of both industrial and social organisations has therefore become not 'stability' but 'flexibility'. Companies have come to organise themselves on a more flexible basis to meet the demands of increased competition, employing 'dislocating strategies' such as outsourcing, networking and subcontracting.¹⁷ At the same time, the organisation of work has changed significantly.¹⁸ There has been a dramatic increase in more flexible forms

¹³ A Supiot, 'The Transformation of Work and the Future of Labour Law in Europe: A Multi-disciplinary Perspective' (1999) 138 (1) *International Labour Review* 31, 33

¹⁴ Rodgers (n 4) 1

¹⁵ Supiot (n 13) 34

¹⁶ L Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford University Press 2009) 81

¹⁷ M Weiss, 'Re-inventing Labour Law?' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 45

¹⁸ Burchell B, 'The Prevalence and Redistribution of Job Insecurity and Work Intensification' in B Burchell, D Lapido and F Wilson (eds), *Job Insecurity and Work Intensification* (Routledge 2002)

of work, which both meet the needs of capital to enhance 'competitive advantage', and also the need of workers to combine work and family responsibilities in the light of the increased labour market participation of women.¹⁹ These more flexible forms of work are often referred to as 'non-standard' or 'atypical' and include: part-time work, fixed-term work, temporary agency work, homeworking and self-employed or economically dependent work.²⁰

The literature on precarious work highlights the disadvantages for workers employed on these non-standard contracts. Firstly, it is argued that jobs created on the basis of 'flexibility' are simply a vehicle through which labour market risk is shifted from employer to worker: the 'gains to employers in matching supply and demand have been translated directly into costs for workers'.²¹ Secondly, there is no incentive for companies to invest in workers in these kinds of jobs, given that these jobs have only peripheral or marginal importance to the company. The result is jobs which are not only insecure, but are also characterised by low pay, low status and little in the way of promotion or training prospects.²² Thirdly, there is also a question mark about the level of 'choice' that labour market participants have in selecting flexible employment. It is argued, for example, that women's continued primary responsibility for childcare leaves them with comparatively few options for paid work, and forces them to accept terms and conditions which are to their detriment and disadvantage. Thus part-time work or other non-standard work is not a 'choice' at all.²³ Finally, there is the problem that labour market institutions are still tied to the model of the 'standard employment relationship'. This means that non-standard workers have great difficulties in obtaining the protections and benefits associated with employment law.²⁴ This position continues despite specific protection for atypical workers through statute.²⁵ Although these statutes create equal treatment

¹⁹ Weiss (n 17) 46

²⁰ Vosko (n 16) 1

²¹ S Fredman, 'Precarious Norms for Precarious Workers' in J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy* (Hart Publishing 2006) 177

²² Ibid 177

²³ Ibid 180

²⁴ K VW Stone, 'Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers' (2006) 27 (2) *Berkeley Journal of Employment and Labour Law* 251, 269

²⁵ Examples from the European Union include Directives covering part-time work, fixed-term and temporary agency work: Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work

rights for non-standard workers, they do not determine their employment 'status' (in terms of being an employee or worker for example). Consequently, these workers still encounter problems in qualifying for many labour law rights.

However, the theoretical strength of the precarious work analysis can be viewed as hampered by the association of precarious work with non-standard work. The empirical reality is that non-standard work is extremely heterogeneous and not all non-standard work can be designated precarious.²⁶ A good example is the phenomenon of temporary agency work. Although some of this work is characterised by low pay and poor working conditions, it is also adopted as a strategy by 'gold-collar' workers to maximise their market power.²⁷ These gold-collar workers often have greater bargaining power than 'standard' workers, and so it is difficult to consider this group 'precarious'. The association of precarious work and non-standard work is not only an empirical problem, but is also normative. It means that the frame of reference for analysing and for regulating for precarious work remains the 'standard' employment relationship in contrast to 'non-standard' forms. This means that regulation covering non-standard work can be limited to situations where that work deviates only slightly from the standard employment relationship. Vosko refers to the ILO Convention on Part-Time Work, which demands that the situation of part-time workers only differs from their full-time equivalent according to the number of 'normal hours' carried out. This, in fact, allows for the exclusion of a range of part-time workers who have contracts which differ significantly from the norm: those workers engaged on a casual, seasonal or temporary basis.²⁸

The transformative power of labour law based on the theory of precarious work is limited for another reason. This theory is underpinned by economic understandings about the transformation of work, and

concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9; Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L 175/43; Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work, OJ [2008] L327/9

²⁶ R Gomez and M Gunderson, 'Non-standard and Vulnerable Workers: A Case of Mistaken Identity' (2005) 12 *Canadian Labour and Employment Law Journal* 177, 178

²⁷ P Leighton, M Syrett, R Hecker and P Holland, *Managing Self-employed, Agency and Outsourced Workers* (Butterworth-Heinemann 2007) 57

²⁸ ILO Convention 175 'Convention Concerning Part-time Work' (International Labour Office 1994); Vosko (n 16) 101

ultimately the *desirability* of non-standard work as emerging from sound and inevitable economic processes. Precarious work is treated as the problem encountered by individuals, which needs to be managed (for example, by equal treatment mechanisms) to ensure that the traditionally poor working conditions associated with this kind of work are addressed. It does not say anything about the *elimination* of precarious work, understood as non-standard work forms.²⁹ This is perfectly compliant with a liberal or neo-liberal understanding of the function of labour law, and therefore cannot engage with debates about whether it is this neo-liberal dominance which is one of the problems when it comes to understanding labour law regulation. It cannot consider whether the problem is systemic: part of a greater shift in the division of national income between workers and owners of capital.³⁰

1.3 LIBERAL THEORY AND THE UNDER-THEORISATION OF THE LABOUR SUBJECT

It is the argument in this book that the theories surrounding precarious work tend to *under-theorise* the notion of vulnerability in employment relationships. Although ‘precarious’ or ‘vulnerable’ workers are referred to often in this literature, the literature on precarious work makes a set of assumptions about what vulnerability means in employment relationships. Those assumptions are essentially based on liberal characterisations of the nature of the labour subject. The first of those assumptions is that vulnerability in employment relationships is created externally to the labour subject. Labour subjects are acted upon by a set of (primarily economic) processes which justify some level of regulation. The second assumption is that vulnerability is a pathological or negative state. It is damaging to individuals, just as it is ultimately damaging to economic processes. Vulnerability denotes a subject of powerlessness and dependency; a subject failing to take advantage of all the benefits that the economic system has to offer. It is argued in this book that it is the combination of these two elements which has resulted in the *under-theorisation* of the nature of vulnerability in employment relationships and of the labour subject. It has meant that labour law does not consider sufficiently the complexity of the labour subject, and therefore is

²⁹ Vosko (n 16) 2

³⁰ This is the argument made by Fudge in J Fudge, ‘Beyond Vulnerable Workers: Towards a New Standard Employment Relationship’ (2005) 12 *Canadian Labour and Employment Law Journal* 151, 172

ill-equipped to promote the autonomy, resilience and agency of individuals or groups in the labour market.

Indeed, it might also be argued that labour law's classical theory of justice also tends to under-theorise the nature of the labour subject. It is possible to argue that some of the classical arguments are complicit with the liberal view of the labour subject identified above. Care must be taken in this assertion, as is clear from the analysis of the writings of the two 'founding fathers' of the classical labour law position (in Europe): Hugo Sinzheimer and Otto Kahn-Freund.³¹ For a start, it is not possible to assert that either author was complicit in a liberal view of *law*. In fact, both authors were profoundly sceptical of a number of liberal legal institutions. They both expressed unease with the notion of freedom of contract in relation to the conclusion of the employment relationship. They were convinced that the inequalities of bargaining power in existence in the capitalist system meant that the employment relationship could never be an institution created by free and equal partners. As a result of his/her economic position the employer was always in a better position to determine the terms of the employment contract, and used the contract as a tool to aid in the suppression and subordination of working individuals. The reliance of workers on the contract of employment for their livelihood meant workers were forced to agree to the terms of the employment contract and remained constrained and limited by those terms. Furthermore, both were influenced by the social law tradition expounded by Gierke, Ehrlich and Renner.³² This tradition will be discussed further in the next section, but this tradition offers a scathing critique of the institutions of liberal law (and particularly the separation between public and private law). Both Sinzheimer and Kahn-Freund were convinced of the limited usefulness of liberal 'state' law in the furthering of the needs of labour. That state law was too divorced from social processes to properly or fully represent the needs of labour.³³ At most, state law should act to cement the autonomously created norms of the

³¹ R Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 (3) *Journal of Law and Society* 341, 341

³² For a discussion of these influences see R Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979) 8 *ILJ* 202 and R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014)

³³ According to Sinzheimer: 'Die Gemeinschaft kann nicht mehr darauf vertrauen, dass ihr Wohl passiv aus den Selbstbestimmungen der einzelnen folgt' (Society can no longer passively rely on the self-interest of individuals – my translation) H Sinzheimer, 'Die Reform des Schlichtungswesens' (1930) in H

social sphere.³⁴ Kahn-Freund also pointed out the limited usefulness of the courts as a means for the resolution of labour disputes. Those courts dealt only with the ‘marginal’ and the ‘sporadic’, and could not hope to create an ordered system of industrial relations (on their own).

However, despite the rejection of the institutions of liberal law, Kahn-Freund and Sinzheimer put forward a view of the liberal *subject* of labour law: workers as autonomous, independent and rational beings. Indeed, this view of the liberal subject was central to the development of Sinzheimer’s idea of dependent labour at the heart of his labour law theory. To promote this theory, Sinzheimer relied on Marx’s ideas about the position of labour under the capitalist system. He argued that the capitalist system distorted the central value of human activity in favour of the promotion of individual ends.³⁵ The insertion of individuals into the capitalist system meant that individuals were separated from their own labour: they no longer had control over their own work and merely served the ends of others. Under the capitalist system, labour was directed and controlled by the profit-seeking aims of capitalists. As a result, work no longer fulfilled a social or personal function for workers. It no longer enabled them to develop their own autonomous ends. The capitalist system was a threat to the liberal subject of labour. Indeed, Sinzheimer referred to the work of (the liberal theorist) Kant in this regard: the insertion of workers in the capitalist system reduced those workers to ‘things’ with a price with no purpose but to serve the needs of others. Instead workers should be viewed as elements of dignity, they belong to the world of ‘spiritual beings’ who have their own autonomous purposes and should be allowed to pursue those purposes with the independence and rationality they naturally possess.³⁶ Sinzheimer’s views were echoed by Kahn-Freund who argued for the promotion of the dignity of labour outside the excessive constraints of the capitalist owners of production.³⁷

Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden (Band 1)* (Otto Brenner Stiftung 1976) 237

³⁴ H Sinzheimer, ‘Zur Frage der Reform des Schlichtungswesens’ (1929) in H Sinzheimer (n 33) 226

³⁵ H Sinzheimer, *Grundzüge des Arbeitsrechts* (2nd ed Gustav Fischer Jena 1927) 8 ff

³⁶ H Sinzheimer, *Grundzüge des Arbeitsrechts* (1927) in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden* (Band 1) (Otto Brenner Stiftung 1976) 8

³⁷ P Davies and M Freedland, *Kahn-Freund’s Labour and the Law* (Stevens 1983) 69

Kahn-Freund and Sinzheimer were also convinced about the external creation of vulnerability. Again the ideas of Marx were promoted here, to argue that workers were made vulnerable by the operation of the capitalist system. That capitalist system not only created labour as 'commodities' to be bought and sold on the labour market, it also created an inequality of bargaining power between employers and workers. That inequality of bargaining power was promoted and maintained by the institutions created by the controllers of labour (for example, the contract of employment). The problem with this view, for the purposes of the arguments in this book, is that it tends to categorise workers in uni-dimensional terms. Particular individual vulnerabilities for the meaning of those vulnerabilities are not specifically theorised or considered. They are also presented as acted upon by the capitalist system in a uniform way, which does not represent the experience of workers in practice. It is argued in this book that there is a need to consider the complex and multi-faceted vulnerability of workers more seriously. There is a need to put this vulnerability centre stage: to start with the subject of labour itself. This subject is not the liberal subject of classical liberal theory. This is the 'vulnerable subject' of sociology and (feminist) philosophy. These ideas will be discussed in the next section.

1.4 PUTTING VULNERABILITY CENTRE STAGE

The concept of 'vulnerability' is very wide. It is used in a great many contexts, both within and outside the law, most of which are beyond the scope of this book.³⁸ In terms of law, it is interesting that the concept of 'vulnerability' has previously been used as a foundational legal principle in areas other than labour law. 'Human vulnerability' is mentioned as one of Hart's 'truisms'. According to his argument, these 'truisms' provide the law with a certain minimum content; they explain the voluntary submission of subjects to law (and morals). Hart's argument is that the

³⁸ There are many examples which could be cited here. One example is the discussion in political, social and healthcare literature about the challenges faced by 'vulnerable adults'. These are defined as 'people who are at greater than normal risk of abuse. Older people, especially those who are unwell, frail, confused and unable either to stand up for themselves or keep track of their affairs, are vulnerable.' See NHS, 'Vulnerable Adults' (11 May 2011) <<http://www.nhs.uk/CarersDirect/guide/vulnerable-people/Pages/vulnerable-adults.aspx>> accessed 15 August 2014

vulnerability of humans to each other, in the sense of physical susceptibility to bodily attack, gives reason for submission to (criminal) legal rules.³⁹ He explains that: ‘If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: Thou shall not kill.’⁴⁰ Moreover, the idea that ‘human vulnerability’ is at the foundation of legal rules is seen in an area of law more closely associated with issues of employment or labour law, that of human rights. For example, Turner argues that the ontological vulnerability of human subjects is the ‘common basis’ of human rights.⁴¹ The definition of ‘human vulnerability’ here is wider than that used by Hart: vulnerability can stem from physical threats (both natural and social), but can also refer to human susceptibility to psychological, moral or spiritual suffering.⁴² In any event, human vulnerability is the universally shared experience which forces human beings to institute legal rules, and specifically universal human rights.⁴³

The wide scope of ‘human’ vulnerability, in terms of its physical, moral and psychological elements, has crept into some corners of labour law. For example, it is possible to argue that the understanding of the scope of this vulnerability has extended the duties imposed on employers, particularly in the field of health and safety at work. An example is the reasoning in relation to stress at work cases; here it is understood that employers should take some responsibility not only for the physical but also the psychological well-being of their employees.⁴⁴ However, the potential of this term in the context of labour law theory has rarely been discussed. For example, in the case of the classical labour law position, the term ‘vulnerability’ appears rarely: the language is of subordination, oppression and other terms relating to the imbalance of power between

³⁹ HLA Hart, *The Concept of Law* (Oxford University Press 1961) 190

⁴⁰ Ibid 190

⁴¹ B Turner, *Vulnerability and Human Rights* (Pennsylvania University Press 2006) 1

⁴² Ibid 28

⁴³ Ibid 6

⁴⁴ In the case of *Walker v Northumberland County Council* [1995] IRLR 35 the Court formulated a test to determine the liability of employers in stress cases. This included the ‘threshold question’ about whether the kind of harm was reasonably foreseeable. This threshold question would depend on a number of factors, including a consideration of the particular ‘vulnerability’ of the Claimant (paras 23–29). See also MJ Davidson and J Earnshaw, ‘Vulnerable Workers: An Overview of Psychosocial and Legal Issues’ in MJ Davidson and J Earnshaw (eds), *Vulnerable Workers: Psychosocial and Legal Issues* (1st Edition, John Wiley and Sons 1991)

labour market participants. In the case of the more recent literature on precarious work, the complexity of human vulnerabilities has also been neglected as the foundational or organisational principle for the constitution of labour law. The reasons for this failure are introduced above and discussed through the course of this book.

The argument in this book is that this failure actually reduces the effectiveness of labour law. A failure to consider in detail the vulnerabilities to which individuals are subject means that labour law does not properly respond to labour's needs. Two theories are introduced which do attempt to deal with this vulnerability more centrally and more fully. The first of these theories has already been mentioned in the context of its influence on the classical labour law scholars: that of social law. It is my argument that the ideas of social law are usefully considered outside the context of classical labour law. It is useful to reconsider these theories in the light of a specific analysis of their take on vulnerability and to build a critique of current labour law based on that analysis. This might, in fact do more justice to these theories than was achieved in the context of classical labour law theory.⁴⁵ Furthermore, it is useful to consider authors within this tradition whose works were not considered in depth by the classical labour law scholars as examples of ways in which this tradition could be developed in an alternative way. Indeed, more modern takes on the function and legal position adopted by social law will be considered as part of this analysis (including the work of Francois Ewald).

However, it is also argued in this book that, although social law is useful in shifting the analysis of labour law in a more sociological direction, it does not encapsulate all of labour law's vulnerability. Although it does draw out a number of the problems associated with the acceptance of liberal political theory and liberal legal institutions, it does posit certain pre-conceived ideas about the nature of vulnerability itself. Vulnerability is connected to social position (for example, in the division of labour as asserted by Durkheim). As laws emanate from the interaction

⁴⁵ Indeed, although both Sinzheimer and Kahn-Freund were influenced by social law in the development of their ideas, the practical application of those ideals did not always meet social law ends. For example, Kahn-Freund's framework of the proper functioning of the industrial relations system was developed in the context of liberal political thinking, within which Kahn-Freund was seemingly complicit. His framework reflected and contributed to the notion of industrial pluralism and 'voluntarism' which underscored the Donovan Royal Commission's findings. This appears to run counter to the social law tradition of the rejection of liberal political ideas and the institutions of the liberal political state. This will be discussed further in Chapter 2.

between individuals then it follows that group position is fundamentally important on this scheme. It is groups who have the ability to be recognised as worthy of protection by the state. As a result, vulnerability is counteracted by the development of strong groups who can fight for rights at a higher level; the achievement of group rights denotes a level of escape from vulnerability for individuals. Of course the reality of our labour market demonstrates that the legal recognition of groups is not sufficient to counteract vulnerability in its entirety. The development of group law (such as that pertaining to precarious workers) is influenced by forces other than the group itself and is not always constructed in a way which either includes all members of the group or ensures group protection. There is also the problem on the social law scheme that rights are never fixed: they are continually shifting according to changes in power relations in society.

This book asserts that it is *vulnerability theory* which has the most potential for the development of labour law. This theory puts the labour subject (in all its complexity) at the heart of labour law. It allows for an analysis of the labour subject which goes beyond the constraints of liberal theory, a theory which has been so influential in the development of our labour law. Instead of considering workers as a set of autonomous, independent and rational beings, acted on unilaterally and unidimensionally by economic forces, vulnerability theory allows workers to be considered as ‘vulnerable subjects’: complex, multi-dimensional actors within a complex multi-dimensional institutional space. This holds potential for labour law because it allows greater thinking about the whole concept of the *agency* of workers and the sustainability of labour law. It also allows greater thinking about the importance of identity in the experience and structure of labour. However, perhaps most of all, it offers to investigate how disadvantage and inequality is created, maintained and perpetuated, and what that means for the vulnerability of the labour subject. In a sense then, it brings together a number of insights to social law and even some of the concerns of the classical labour law scholars without being constrained by their particular context. It suggests that precarious work will not be tackled without a profound examination of all the institutions which create vulnerability and the position of workers within that. Until these structures are addressed (for example, the constraints of the need to show an ‘employment relationship’ for access to legal rights, and the need to conform to a particular legal identity, such as domestic worker, temporary worker, and so on), then individuals cannot build the resilience and autonomy which should be the aim of any legal system of labour rights.

1.5 STRUCTURE OF THE BOOK

Following the introduction, Chapter 2 outlines the context of vulnerability in employment relationships. The first half of Chapter 2 sets out the series of external pressures which are brought to bear on employment relationships, and how those pressures have been theorised. Economic pressures are discussed in terms of the systemic pressure of the capitalist system, which forms the heart of the classical labour law position on the nature of vulnerability in employment relationships. They are also discussed in terms of more modern economic changes, which, it has been argued, have created a specific set of work arrangements. Those new work arrangements have, in turn, determined a layer of ‘precarious workers’ in the labour market. These precarious workers display a set of particular vulnerabilities (and need to be regulated in a particular way as a result). Chapter 2 then moves to discuss legal and social changes which have been brought to bear on employment relationships, and how those have affected the vulnerability of workers. The second half of Chapter 2 sets out the problems with this external theorisation of vulnerability, namely that it fails to really theorise vulnerability at all. The alternative ‘internal’ constructions of vulnerability are then discussed and their potential value for widening the ‘external’ perspectives outlined in the first half of Chapter 2.

Chapter 3 builds on this contextualisation of vulnerability in employment relationships. It outlines how the contextualisation and conceptualisation of vulnerability in employment relationships leads to the theorisation of particular legal solutions. Four theoretical positions (introduced in Chapter 2) are discussed: (1) classical labour law theory, (2) efficiency theory, (3) social law theory and (4) vulnerability theory. Practical examples of the application of those theories are discussed. For example, classical labour solutions are discussed in relation to the promotion of collective bargaining, efficiency theories are linked to the phenomenon of precarious work and its regulation, and social law is discussed in the context of the promotion of (substantive) equality. The potential of vulnerability theory for widening the reach and scope of current labour laws (in relation to vulnerability) is discussed. These themes are taken up more specifically in Chapter 4. This chapter provides an in-depth analysis of the regulations and policy relating to precarious work at different geographical levels. The relationship of these instruments with the different theoretical perspectives introduced in the introduction and developed in Chapters 2 and 3 are discussed. In particular, there is an assessment of the fit of each of these policies with the aims

and aspirations of vulnerability theory, and some tentative suggestions are made about the direction of the aims of this legislation in the future.

Chapters 5 and 6 present two case studies on temporary agency work and domestic work respectively. These case studies are chosen as these groups are widely considered to be particularly precarious or vulnerable in the labour market. In each of these case studies there is an overview of the legal instruments pertaining to them. There is then a discussion of how the vulnerability of these groups would be characterised in the different theoretical perspectives introduced in this book, and how far the current regulations relating to these groups meet the regulatory goals of these different perspectives. Finally, criticisms of the different theoretical perspectives are made. At the end of each section, there is a particular section on the potentiality of vulnerability theory for re-thinking and re-assessing the needs of these groups, and what that means in terms of potential regulations for these groups.